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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

No. 94-1614 (5)
STATE OF WISCONSIN, Petitioner
v.
CITY OF NEW YORK, et al., Respondents.

No. 94-1631 (4)
STATE OF OKLAHOMA, Petitioner
v.
CITY OF NEW YORK, et al., Respondents.

No. 94-1985 (3)
UNITED STATES DEPARTMENT OF COMMERCE, et al., Petitioners
v.
CITY OF NEW YORK, et al., Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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COUNTER-STATEMENT OF QUESTION PRESENTED

After determining that plaintiffs had proved by conclusive evidence that (a) adjusted census data prepared by the Bureau of the Census would increase the accuracy of the census and (b) the decision of the Secretary of Commerce rejecting use of those data did not reflect a good-faith effort to render a census as accurate as practicable, the court of appeals remanded the case to the district court to give the Secretary an opportunity to show that his decision against adjustment was essential to achievement of a legitimate governmental objective. The question presented is whether this Court should grant interlocutory review of the court of appeals' order before the factual record is complete, before either court below has determined the Secretary's decision to be unconstitutional and before either court has considered an appropriate remedy.

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Respondents the City of New York, the State of New York, the State of Texas, the City of Los Angeles, the City of San Francisco, the City of San Jose, the City of

Tucson, the City of Long Beach, the City of Pasadena, the City of Inglewood, the County of Los Angeles, the County of Broward and the Navajo Nation respectfully request that the petitions for writs of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in Nos. 94-1614, 94-1631 and 94-1985[1] be denied.

Preliminary Statement

The 1990 decennial census, as reported by the United States Department of Commerce ("Department"), reflected an undercount of the national population. Not all

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[1] The petition in No. 94-1614, State of Wisconsin v. City of New York, et al. ("Wisc. Pet."), was filed by the State of Wisconsin on April 3, 1995. The petition in No. 94-1631, State of Oklahoma v. City of New York, et al. ("Okla. Pet."), was filed by the State of Oklahoma on April 4, 1995. The petition in No. 94-1985, United States Department of Commerce, et al. v. City of New York, et al. ("U.S. Pet."), was filed by the United States on June 5, 1995. Upon application, the Clerk of the Court on April 24, 1995 extended the time of respondents to file a brief in opposition to all petitions to and including May 31, 1995 and, upon further application, on June 1, 1995 extended that time to and including July 3, 1995.

areas or groups of Americans were equally affected: as in previous censuses, the undercount was differentially severe among members of racial and ethnic minorities.

Having anticipated, based on its experience with previous censuses, that a differential undercount would occur in the 1990 census and recognizing that a differential undercount undermines the accuracy of census data when used to allocate political representation or government funds, the Bureau of the Census ("Bureau") designed and executed, as part of the 1990 census, procedures that would have permitted a statistical adjustment of the census to correct for the differential undercount. The Bureau prepared and reviewed adjusted census data that, in the Bureau's analysis, ameliorated the differential undercount.

In June 1991 the Bureau concluded that the adjusted census data were more accurate than the unadjusted counts, and the Director of the Bureau recommended to the

Secretary of Commerce ("Secretary") that the 1990 census be adjusted on the basis of the data the Bureau had prepared. In July 1991 the Secretary issued a formal decision rejecting the recommendation of the Bureau's director that the census be adjusted, as well as the Bureau's expert judgment that the adjusted data had been shown to be more accurate.

Plaintiffs challenged the Secretary's decision, alleging that, as the Bureau had concluded, the adjusted data had been clearly shown to be more accurate, that the Secretary's contrary determination had not been made in good faith, and that as a consequence residents of adversely affected jurisdictions were being denied the political representation to which they were entitled, a claim of constitutional dimension. After extensive discovery and a 13-day trial, the district court found that plaintiffs had shown the adjusted data to be more accurate; but, having

concluded that it was empowered to conduct only a limited review of the Secretary's decision, the court entered judgment for defendants because the Secretary's decision was not "so beyond the pale of reason as to be arbitrary or capricious."

On appeal, plaintiffs argued that, in light of the constitutional claim presented, the district court should have reviewed the Secretary's decision de novo. The court of appeals rejected that argument. But, following the teachings of this Court on the standard of review for governmental decisions determining the allocation of political representation and the conduct of the census, the court of appeals concluded that the Secretary's decision should have been subject to a higher level of scrutiny than that applied by the district court. Upon plaintiffs' showing that the adjusted census data were more accurate and that the Secretary's decision against adjustment was not made in

good faith, the court of appeals held, the burden of proof shifted to the Secretary to show that use of the unadjusted count as the census was essential to the achievement of a legitimate governmental objective. The court of appeals vacated the judgment of the district court and remanded for further proceedings.

Petitioners now seek review of that interlocutory order. The petitions fail, however, to show the existence of such unusual circumstances as would warrant issuance of writs of certiorari before final judgment. The decision of the court of appeals is a straightforward application of well-established precedent from this Court. Nor is the court of appeals' decision in conflict with the decisions of two courts of appeals that, on quite different facts, rejected cases seeking to compel other adjustments of the census.

STATEMENT OF THE CASE

a. Error in the unadjusted census. Inevitably, the decennial census is subject to considerable error.[2] Appendix to Petition for Writ of Certiorari in No. 94-1614 ("Pet. App."), at 46; see also Transcript of Trial ("Tr."), at 80-88. For the 1990 census the Bureau has estimated that the unadjusted census counts reflect 25 million, and perhaps as many as 32 million, errors involving erroneous inclusion or exclusion of persons: persons counted who should not have been or counted two or more times ("erroneous enumerations") and persons not included who should have been ("gross omissions"). Pet. App. 259; see also Tr. 83-84. For any given block, the census count is

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[2] For a historical account of census-taking in the United States, including efforts to deal with census error, see M. Anderson, The American Census: A Social History (1988). For a summary of recent research and planning for 2000, see National Research Council, Modernizing the U.S. Census (1995).

not, and is not meant to be, especially reliable. Tr. 1315-1316.

"Net undercount" in the census is the difference between gross omissions and erroneous enumerations. Pet. App. 49, 261; Tr. 89-92. Where net undercount is differentially distributed geographically, it systematically compromises the accuracy of census data for allocating electoral representation and funding. The most serious systematic error affecting the decennial census is the differential undercounting of members of minority groups. Pet. App. 49-50. For the 1990 census, the undercount rate for blacks was 4.8%, for Hispanics 5.2%, for Asian/Pacific Islanders 3.1% and for American Indians 5.0%. Pet. App. 50. On any estimate of the net national undercount, those rates significantly exceed the average undercount rate for the American population. Taking the Department's current estimate, the undercount rate for blacks was three times the

national average, undercount rates for Hispanics and American Islanders were even worse, and the undercount rate for Asian/Pacific Islanders was nearly twice that of the nation as a whole. Because members of minority groups are not evenly distributed geographically, the consequence of the differential undercount is that areas in which members of minority groups are concentrated are systematically deprived of political representation and funding they would otherwise have received. Pet. App. 46, 50; Tr. 92, 1197-1198.

b. Development of the Post-Enumeration Survey. The problem of differential undercount in the 1990 census was neither new nor unexpected. By the 1950's, the Bureau and academic researchers had developed reliable techniques of demographic analysis (monitoring national population change through records of births, deaths, immigration and emigration) and were able to confirm

differential undercounts of blacks in the 1940 and 1950 decennial censuses. Pet. App. 39, 49-50; Tr. 496, 506. By the 1960 census, additional population research advances allowed the Bureau to begin to evaluate the census's deficiencies through "dual-system estimation " Pet. App. 7. To simplify, dual-system estimation involves the use of a second survey to assess the completeness of an original count: a sample is drawn from the population to have been counted, the percentage of the sample actually counted is determined and an estimate of undercount is made on the basis of the portion of the sample found not to have been reached. Pet. App. 51; Tr. 506-507. Dual-system estimation checks were incorporated into the 1960 and 1970 census processes; along with demographic analysis at the national level, the Bureau's dual-system estimation confirmed the persistence of differential undercounting. Pet. App. 52. In 1980 the Bureau designed and executed

the "Post-Enumeration Program" ("PEP"), a more ambitious version of the evaluative procedures that had been used to measure undercount in the previous two decennial censuses. Pet. App. 50 n.3. The PEP, like demographic analysis, showed another severely differential undercount in the 1980 census. Pet. App. 50.

Bureau personnel were troubled by the persistence of the differential undercount. To them, as to outside researchers, it had become plain that no combination of "outreach" programs and energetic canvassing would alleviate the problem. Tr. 506, 1291-1292. By 1984 the Bureau had embarked on a systematic research program to develop a more sophisticated dual-system estimation technique that would be usable not only to evaluate the extent of census coverage deficiencies but to correct them and thereby improve the accuracy of the count. Tr. 516-521. The technique, based upon improvements in the 1980

PEP, was named the "Post-Enumeration Survey" ("PES"). Tr. 1297. In congressional testimony and appearances before professional organizations in 1986 the Bureau's senior staff reported on the successes of their developing design; simultaneously, test censuses allowed the Bureau to ascertain that individual components of the PES, and the PES overall, functioned as intended. Pet. App. 50-53; Tr. 621-622, 1298-1301, 1307-1308.

c. Commencement of this litigation. Development of the PES as a technique for adjustment was retarded, however, in 1987, when the Department of Commerce intervened and announced in a press release that the 1990 census would not be statistically corrected. Pet. App. 52-53; Tr. 1326. The Department's press release was never supplemented by any formal presentation of the reasons underlying it: in broad terms, without reference to the differential undercount, the Department stated merely

that the 1990 count was expected to reach 99% of the national population. Tr. 1327-1332. The PES would still be conducted, but its sampling design would not be specifically calibrated for use in adjustment and further development of adjustment techniques would be suspended.

In November 1988 the first of the three consolidated lawsuits giving rise to the petitions was filed, City of New York, et al. v. United States Department of Commerce, et al., in the United States District Court for the Eastern District of New York. A broad coalition of state, county, city, organizational and individual plaintiffs alleged that the decision to leave the 1990 census unadjusted would predictably result in a differential undercount of members of minority groups.[3] Plaintiffs moved for a preliminary

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[3] Two other cases, initiated in 1992 in other jurisdictions, were later transferred to the United States District Court for the Eastern District of New York and consolidated with the earlier-filed action. Pet. App. 61 n.14.

injunction to ensure that, pending the outcome of the litigation, the PES would be conducted in a manner that would permit its use for adjustment.

On July 17, 1989, the day scheduled for commencement of a hearing on the motion for a preliminary injunction, defendants agreed to a stipulation under which, inter alia, the decision against adjustment was vacated and the PES restored to a size (ultimately involving a sample of approximately 400,000 Americans) that would make it usable for adjustment. Defendants also agreed to reconsider the question of adjustment with an open mind and without prejudgment, to publish guidelines that would articulate the considerations they intended to apply in deciding whether to adjust, to release uncorrected census results (if at all) only with a cautionary indication to recipients that the numbers were subject to adjustment to correct for undercounting and to appoint a special advisory panel comprising eight

members, four of whom would be selected by the Secretary from a list of seven to be proposed by plaintiffs and four of whom would be selected independently by the Secretary. Pet. App. 96-120.

In the spring of 1990 defendants promulgated guidelines in purported compliance with the 1989 stipulation. Plaintiffs challenged the guidelines on the grounds that they reflected an impermissible bias in favor of the unadjusted count, that they reflected an intention to predicate the adjustment decision on factors other than accuracy and that they failed to set forth the technical considerations (as opposed to generalized statements of policies) that defendants would weigh in their decision. The district court upheld the guidelines. Pet. App. 96-120. Limiting itself to consideration of whether the guidelines satisfied the 1989 stipulation -- i.e., forgoing consideration of whether the guidelines satisfied constitutional

requirements -- the court found that, although "[d]efendants [had] done the bare minimum" and "the issue [was] indeed close, defendants [had] satisfied their obligations thus far." Pet. App. 116.

Both the 1990 census and the PES, conducted as part of the census, took place as scheduled. As anticipated, and as discussed above, the uncorrected census was affected by a severely differential undercount.

The Bureau determined that the differential undercount in the uncorrected census could be substantially ameliorated through adjustment. Pet. App. 59. The Bureau's director, Barbara E. Bryant, formally recommended to Secretary Robert A. Mosbacher that the 1990 census be adjusted. Pet. App. 59.

d. The Secretary's decision. Secretary Mosbacher rejected that recommendation. At the outset of his decision, he acknowledged the net undercount and the

severely differential undercount in the uncorrected census. Pet. App. 138-139. The Secretary acknowledged too that the Bureau had found that adjustment would improve distributive accuracy for places containing two-thirds of the national population. Pet. App. 141-142. He conceded that "the PES was a generally high-quality survey that was well-executed" and that "[t]here is little doubt that the PES detected an overall undercount in the census and a differential undercount at the national level by race and ethnic origin." Pet. App. 169. Nonetheless, the Secretary decided against adjusting the census to correct for the differential undercount.

Proceedings Below

1. On Secretary Mosbacher's announcement of his decision, plaintiffs challenged his refusal to accept the recommended adjustment. In May 1992, after extensive discovery, the district court presided over a 13-day trial, at

which testimony was offered from 14 statisticians and demographers. Pet. App. 61.

The evidence at trial demonstrated that the Bureau's own research, which formed the basis for its director's recommendation in favor of adjustment, showed that the adjusted counts provided superior distributive (as well as numeric) accuracy. Plaintiffs demonstrated (and the point has not been contested by respondents) that adjustment would alleviate the differential undercount of minorities, improving distributive accuracy for demographic groups' shares of the population. Pet. App. 94-95; Tr. 1197-1198.

The basis for the Bureau's conclusion, and thus the heart of plaintiffs' case, included comparison of the adjusted and unadjusted data with demographic analysis, Tr. 883-895; evaluation of potential sources of error in the PES, Tr. 250-251, 646-648, 1500-1502; confirmation that patterns of undercount described by the PES corresponded

with Bureau experts' expectations, based upon decades of study of the problem of differential undercount, Tr. 645, 1543-1547; and systematic comparison of errors in the adjusted and unadjusted counts ("loss function analysis"), Tr. 596-601, 925-970.[4]

The Bureau's analyses showed that adjustment would dramatically increase the accuracy of the census. Tr. 935-970. The analyses proved that adjustment would increase numeric accuracy, of course, but, more important, they showed dramatic increases in distributive accuracy in terms of the apportionment of the House of Representatives, demographic groups as shares of the national population, states as proportions of the nation, components of states as proportions of their respective states and areas of the nation

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[4] For a general discussion of the application of loss function analysis to the decision whether to adjust the census, see C. Citro & M. Cohen (eds.), The Bicentennial Census: New Directions in Methodology for 1990 278-292 (1985) (Plaintiffs' Exhibit 2).

in various size categories as proportions of the nation. Those analyses, and testimony explaining and expanding upon them, were introduced into evidence at trial. Id.

At trial, plaintiffs also showed that the Secretary's characterization of the Bureau's analyses betrayed either a misunderstanding or misuse of the data. For example, the Secretary reported that the Bureau's analysis showed that adjustment would "worsen" accuracy for 21 states (in terms of shares of the national population) and, with a modification of the Bureau's analysis, would "worsen" accuracy for 28 or 29 states. But that report reflected two fundamental errors: the Secretary was ignoring both the magnitudes and the probabilities of the errors. Adjustment would most clearly improve distributive accuracy where it has the greatest impact, in states such as California and Wisconsin that have very large relative undercounts or overcounts. In states with small relative under- or

overcounts, i.e., where the difference between the unadjusted and the adjusted shares is small, it is less clear, but also less important, whether adjustment represents an improvement in distributive accuracy. Many of the states that the Secretary said would be "worsened" by adjustment would in fact be virtually unaffected: adjustment would have changed their shares of the national population too little for any practical impact in terms of representation, funding or anything else. Ignoring the constitutionally primary purposes of the census and the indisputable improvement in census accuracy adjustment was shown to have for those purposes, the Secretary focused on potential errors of no constitutional moment. Pet. App. 77. See Tr. 993-1075. And many of the states that the Secretary said would be "worsened" had probabilities of improvement that, though less than even, were not far from it. The Secretary ignored the fact, clearly presented in the Bureau's

analyses, that the large improvements to be achieved from adjustment were much more likely than the marginal "disimprovements." Tr. 995, 1001-1075. The Secretary also ignored the fact that the places clearly improved contained the great majority of the nation's population.[5]

Referring specifically to the Bureau's analyses (and the Secretary's interpretation of them), the district court stated, "This Court is satisfied that for most purposes the PES resulted in a more accurate -- or to be statistically fashionable, less inaccurate -- count than the original census," Pet. App. 59, and found that "plaintiffs have made a compelling attack . . ., and the Secretary has conceded that the objective criteria used to measure the adjusted counts show a greater numeric accuracy at the national level

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[5] In the court of appeals, the United States conceded the defects just mentioned in the Secretary's attempted analysis of the number of states whose shares could be expected to be improved or worsened by adjustment. Federal Appellees' Court of Appeals Brief 47 n.16.

and that the Census Bureau estimates of distributive accuracy marginally favor the adjusted counts," Pet. App. 77. The district court agreed with plaintiffs that "adjustment is statistically feasible, and would improve the quality of the counts for most purposes while ameliorating the profoundly disturbing problem of differential undercount," Pet. App. 94-95, and stated that, "were this Court called upon to decide this issue de novo, I would probably have ordered the adjustment," Pet. App. 89. But the court concluded that its role was limited to determining whether the Secretary's decision was arbitrary and capricious, Pet. App. 90-91, when measured against the Secretary's Guidelines, see Pet. App. 69. So limited, the court determined that "the Secretary's decision not to adjust is [not] so far beyond the pale of reason as to be arbitrary or capricious," Pet. App. 89. Although the court undertook no independent analysis of the constitutionality of the

Secretary's decision, the court concluded, based on its finding that the Secretary's decision was not arbitrary or capricious that the decision "does not violate the [Administrative Procedure Act, 5 U.S.C. § 706(2)(A) ("APA")], the Constitution, the [July 1989] Stipulation, or any statute." Pet. App. 94.

2. On appeal, plaintiffs argued that the district court had adopted the wrong standard for review of the Secretary's decision. Plaintiffs contended that the Secretary's decision affected constitutional rights, because the differential undercount had been shown to result in a malapportionment of the House of Representatives and to affect intra-state redistricting, and that the district court's deferential review of his decision was therefore erroneous. Plaintiffs argued that the district court should have reviewed the Secretary's decision de novo.

The court of appeals agreed with plaintiffs that the lower court had erred in the deference it accorded the Secretary but rejected plaintiffs' argument for de novo review. The court of appeals reasoned that, since this case involves claims that the unadjusted census deprives citizens of equal votes by diluting the voting strength of residents of areas with high undercount, the Secretary's decision was to be reviewed under a line of analysis that begins with Baker v. Carr, 369 U.S. 186 (1962), and continues through Karcher v. Daggett, 462 U.S. 725 (1983). Pet. App. 26-31. That line of cases, according to the court of appeals, (1) requires that, as near as practicable, one person's vote must be worth as much as another's; (2) holds that the right to vote is impaired by dilution as well as by complete disenfranchisement; and (3) imposes upon states the obligation to make a good-faith effort to achieve the goal of one-person, one-vote. Pet. App. 31. The court of appeals

concluded that the same reasoning applies, mutatis mutandis, to federal decisions bearing on equality of representation. Because of separation of powers considerations, the court of appeals determined, de novo review would be inappropriate. Pet. App. 34. And because of constitutional constraints, precise equality of populations in congressional districts cannot be maintained across state lines. Nonetheless, the court of appeals reasoned that recent decisions of this Court, including United States Dep't of Commerce v. Montana, 503 U.S. 442, 463-464 (1992), and Franklin v. Massachusetts, ___ U.S. ___, 112 S.Ct. 2767, 2777 (1992), teach that a good-faith effort to achieve equality of voting power as nearly as is practicable is required of federal officials in the discharge of responsibilities to conduct and report the census. Pet. App. 34-35.

Applying Karcher v. Daggett, 462 U.S. at 730-731, the court of appeals held that the burden was initially on plaintiffs to show that the Secretary had failed to make a good-faith effort to achieve a census as accurate as practicable. Pet. App. 36-37. The court held that plaintiffs had met that burden by demonstrating that the adjusted counts were generally more accurate, especially with respect to alleviating the differential undercount of minorities, and by showing that the Secretary had declined to adopt the more accurate adjusted counts because he remained uncertain about distributive accuracy at some smaller geographic levels. Pet. App. 38-39.

Following Karcher, 462 U.S. at 740, the court of appeals concluded that plaintiffs' proof sufficed to shift the burden to the Secretary to show that use of the less accurate unadjusted census data "(a) furthers a governmental objective that is legitimate, and (b) is essential for the

achievement of that objective." Pet. App. 37, 40. The court of appeals remanded the case to permit the Secretary to essay that demonstration.

REASONS FOR DENYING THE PETITION

1. The Petitions Fail to Present Unusual Circumstances Warranting Interlocutory Review

The petitions seek interlocutory review by this Court. As the United States recognizes, "The court of appeals in this case did not squarely hold that the Secretary's decision against adjustment violated the Constitution." U.S. Pet. 28. Nor did the court of appeals discuss appropriate relief to be awarded by the district court, should that court on remand find in favor of plaintiffs. Ordinarily, the writ of certiorari is not granted to review interlocutory orders. See Virginia Military Institute v. United States, ___ U.S. ___, 113 S.Ct. 2431

(1993) (Scalia, J., concurring) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction") (collecting cases). Issuance of a writ of certiorari in cases presented for review of interlocutory orders is confined to instances in which review "is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." American Construction Co. v. Jacksonville, T. & K. R. Co., 148 U.S. 372, 384 (1893). "[E]xcept in extraordinary cases, the writ is not issued until final decree." Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916). See R. Stern, E. Gressman, S. Shapiro & K. Geller, Supreme Court Practice § 4.18, pp. 195-198 (1993).

Wisconsin and Oklahoma do not, in their petitions, acknowledge that they seek review of an interlocutory order; accordingly, they present no extraordinary circumstances to justify issuance of the writs they seek.

The United States, by contrast, admits that "the interlocutory posture of the case might in other circumstances weigh against review by this Court," but suggests that "unusual circumstances" warrant review now. U.S. Pet. 28.

The United States identifies only two "unusual circumstances" to justify the grant of certiorari at this stage of the litigation. First, the United States argues that the failure to grant review will mean that "this case may well remain unresolved at or near the time of the 1996 presidential and congressional elections, [which] could be avoided if this Court grants review at this time." U.S. Pet. 29. Obtaining two extensions of time in the process, the United States delayed until June 1995 to file a petition for review of the court of appeals' decision, rendered in August 1994; were the United States seriously committed to expedited resolution of this case, its prompt filing of a

petition for certiorari would have permitted denial of the petition for interlocutory review, remand to the district court and review by this Court after final judgment before the 1996 elections. Having acted tardily, the United States should not now be heard to invoke an exigency of its own making as a basis for interlocutory review. In any event, this case was also unresolved at the time of the 1992 presidential and congressional elections (at which time the case had been tried to the district court and a decision after trial was pending) and at the time of the 1994 congressional elections (at which time the case had been decided by the court of appeals and petitions for rehearing filed by the states of Wisconsin and Oklahoma were sub judice). The United States cites nothing to suggest that any uncertainties created by the pendency of the district court's decision in 1992 or the existence of the unreviewed court of appeals decision in 1994 created any extraordinary inconvenience or

embarrassment for anyone at all, let alone petitioners in particular.[6]

The second putatively "unusual circumstance" the United States identifies is that "[n]o further proceedings are needed to clarify the issues presented or to render the case suitable for resolution by this Court." U.S. Pet. 29. Far from being unusual, however, that is the status petitioners can commonly claim in cases in which a court of appeals vacates the judgment of a district court and remands for further proceedings. That was, for example, the situation in Virginia Military Institute, in which the court denied a petition for certiorari after the court of appeals had vacated the judgment of the district court in favor of Virginia

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[6] Indeed, the situation in the fall of 1994 was more uncertain than it is now, since it was understood then that the federal defendants would probably not be seeking review of the court of appeals' decision. See B. Vobejda, "Administration Lets Census Ruling Stand; Decision Awaits on Use of Adjusted Numbers," Washington Post (September 22, 1994), at A18.

Military Institute and remanded the case for determination of an appropriate remedy. Concurring in the denial of the petition for certiorari, Justice Scalia noted his view that it was "prudent" to defer review until "the litigation below has come to final judgment."

Similar prudence is appropriate here. The United States offers as the question presented by its petition that of: "Whether the decision of the Secretary of Commerce not to undertake a statistical adjustment of the 1990 census violated the Constitution." U.S. Pet. i. But the United States also acknowledges that the court of appeals did not "squarely" address that question. U.S. Pet. 28. And although the district court summarily concluded that the Secretary's decision did not violate the Constitution, inter alia, Pet. App. 94, the thrust of that court's analysis was directed at determining whether the decision was arbitrary and capricious in light of the Secretary's guidelines and

under the APA, Pet. App. 61-91. Thus, if this Court grants the pending petitions, it will be (on the United States' own view of the case) the first tribunal to consider whether the Secretary's decision violated the Constitution. Because this Court does not "ordinarily address for the first time . . . . an issue which the Court of Appeals has not addressed," J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 568 (1981), respondents submit that that is not a basis for the prudent exercise of certiorari jurisdiction.

Other related considerations yield the same conclusion. The present state of the record, despite the United States' assurances, requires at least some modest additions. Consider, for example, the question of the Bureau's best current estimate of overall undercount in the uncorrected 1990 census. In its petition, the United States first acknowledges that the Secretary of Commerce estimated the overall undercount to be 2.1% of the national

population. U.S. Pet. 4, citing Pet. App. 158. Then the United States says that the Bureau subsequently "represented at the trial in this case that the undercount was 1.6% of the population." U.S. Pet. 4, citing Pet. App. 58 n.12. The cited source is in the trial court's opinion, but not from the trial: it reflects the district court's reading of a newspaper story that appeared in December 1992, more than a half year after the trial ended and the record closed. Next, citing a 1993 publication by Barbara E. Bryant, then Director of the Bureau, the United States says the Bureau subsequently lowered its estimate of the undercount to 0.9% to 1.2%. U.S. Pet. 4 n.4. Finally, citing no source at all, the United States asserts that, "The Commerce Department now believes, however, that 1.6% is the correct estimate of the undercount."

The United States is not prepared to stipulate that the outcome of a remand is a foregone conclusion. The

Second Circuit imposed upon the Secretary, on remand, a precisely stated burden: to show that the decision against adjustment "(a) furthers a governmental objective that is legitimate, and (b) is essential for the achievement of that objective." Pet. App. 40. That burden, to be sure, is more onerous than what the district court required of the Secretary. But the United States has not claimed that the standard dictates the result. We do not believe it can be inferred from the United States' silence in its petition that, on remand, the United States will deem itself bound to confess judgment. On the contrary, we believe that this Court should have the benefit of the United States' proffer and its disposition by the lower courts.

Finally, no court has yet considered what, if any, relief would be appropriate upon plaintiffs' proof of their claims. The United States has specifically reserved at least the argument that, even were the case remanded to the

district court and the district court to enter judgment in favor of plaintiffs, an order requiring reapportionment of the House of Representatives would be inappropriate. U.S. Pet. 27 n.24. There is no suggestion in any of the petitions, nor anywhere else in the record, that this case is one in which interlocutory review is needed to protect petitioners against injuries that would occur as a consequence of the entry of a final judgment in plaintiffs' favor and that could not be completely redressed through full review after final judgment in keeping with this Court's usual practice.

2. The Decision of the Court of Appeals, Which Vacated the Judgment of the District Court and Remanded the Case for Further Proceedings, Was Correct

Petitioners' argument that no further proceedings are necessary before review of the court of appeals' decision rests fundamentally on the claim that that decision is so obviously and grievously flawed that it merits immediate

reversal. The United States purports to identify three major defects in the court of appeals' decision: that the court of appeals erroneously preferred numeric to distributive accuracy and rejected the Secretary's well-reasoned reliance on distributive accuracy, U.S. Pet. 22; that the court of appeals had no basis for its conclusions that plaintiffs had shown the adjusted data to be more accurate and that plaintiffs had shown the Secretary's contrary determination did not reflect an effort to achieve the most accurate census practicable, U.S. Pet. 23; and that the court of appeals wrongly mandated heightened scrutiny of the Secretary's decision merely because that decision had a racially disparate impact, U.S. Pet. 23-26. In fact, the court of appeals' decision reflects no misunderstanding of the Secretary's decision or the record of the case and no departure from this Court's precedents.

a. There is not, and never has been, any dispute in this litigation (or among experts on the adjustment issue) that distributive accuracy is the object of adjustment. Virtually all of the loss function analyses conducted by the Bureau and presented at trial were comparisons of distributive accuracy. See Pet. App. 366 (Bureau used "loss function analysis to assess the accuracy of the distributions of population across states, places, and counties for the adjusted and unadjusted census"). That is apparent from the district court's opinion, which explicitly accepts the primacy of distributive accuracy, Pet. App. 77, and, equally explicitly, finds that the Bureau's analyses demonstrated the superior accuracy of the adjusted counts "for most purposes," Pet. App. 59. The parties' dispute over those analyses was not over whether distributive accuracy was the appropriate criterion for decision. Rather, the dispute was over whether the Secretary, by rejecting the

Bureau's analyses of distributive accuracy in favor of his own interpretations of the data, decided against the most distributively accurate census practicable. See Pet. App. 21.

The United States asserts that the court of appeals, erroneously preferring numeric to distributive accuracy, faulted the Secretary for his contrary preference, while "entirely fail[ing] to explain how the goal of equal representation for equal numbers of people in the several States could be better served by focusing on the total numeric accuracy of the census figures at the national level." U.S. Pet. 22 (emphasis in original). But that assertion misstates the court of appeals' analysis. The critical paragraph in the court of appeals' decision, in which the court explained the basis for its conclusion that the Secretary's judgment was not made in good faith, is as follows:

> In the present case, the findings of the district court . . . plainly show that plaintiffs carried their burden of proving that the Secretary's refusal to adjust the census in accordance with the PES did not reflect an effort to achieve equality as nearly as practicable. Those findings are supported by, inter alia, the Secretary's acknowledgement that the PES-indicated adjustments would likely not only make the census more accurate nationally, but would also reduce the disparate impact of the census' inaccuracies on minority groups, and that he gave other factors priority over achievement of greater accuracy. For example, he stated that he valued "distributive accuracy" over numerical accuracy; and in stating that an adjustment would not be made because it would not result in greater distributive accuracy, the Secretary revealed that he would decline to make the generally improving adjustment that would lessen the disproportionate undercounting of minorities if it would result in a distribution of Representatives that would be different from the present distribution, although just as accurate.

Pet. App. 38 (emphasis in original). The court of appeals did not state that it concluded numeric accuracy was more important that distributive accuracy. Rather, the court gave

it as the Secretary's conclusion that residual uncertainty about what he called "distributive accuracy" was more important than certainty about "lessen[ing] the disproportionate undercounting of minorities" -- which he called "numeric accuracy."

The Bureau had developed the PES as a census adjustment technique precisely because of a concern for the distributive consequences of differential undercounting of members of minority groups. Pet. App. 50-51. If members of minority groups were evenly distributed throughout the nation, the differential undercount would have had no consequences in terms of representation or funding. But they are not so distributed: they are concentrated in certain areas. Pet. App. 17. That is why the differential undercount has "deleterious effects on the accuracy of census counts" and "unfair results aris[e] from such inaccuracy," Pet. App. 50.

The Secretary conceded that the "PES-adjusted estimates reflect more accurately the total population and the racial and ethnic populations of the country." Pet. App. 146 (emphasis supplied). With that concession, the Secretary also conceded (albeit tacitly) that, ceteris paribus, adjustment would improve the distributive accuracy of the census. The Secretary himself chose to describe that consequence, misleadingly, as only "[i]mproved numeric accuracy," Pet. App. 147. The court of appeals, by contrast, recognized the distributive (i.e., geographically differential) consequences of the differential undercount: "The impact of the differential undercount was naturally more severe in those areas in which racial and ethnic minorities were more concentrated." Pet. App. 17. The court of appeals' decision reflects a primary concern with the distributive consequences of the undercount; understandably, the decision does not present a justification

for a preference for numeric accuracy, because the decision reflects no such preference.

b. The United States discounts as unexplained the district court's several findings that the adjusted data had been shown to be more accurate. U.S. Pet. 23. But the district court's statement that it was "satisfied that for most purposes the PES resulted in a more accurate" census, Pet. App. 59, follows a description of how the Bureau measured error in the PES and compared the accuracy of the adjusted and the unadjusted counts, id. That analysis formed the basis for the district court's further statement that, had it been considering the issue de novo, it "would probably have ordered the adjustment." Pet. App. 89. Those findings provide a solid basis for the court of appeals' conclusion that plaintiffs had shown the adjusted counts to be more accurate.

Because it confined itself to determining whether "the Secretary's conclusions under each guideline" were arbitrary and capricious, the district court did not set aside the Secretary's decision. Pet. App. 89. Deferring to the Secretary's authority both to set the criteria for decision by creating the guidelines and to decide the adjustment issue by applying his guidelines, the district court concluded that "under Guideline One, the presumption of accuracy runs in favor of the original census count," Pet. App. 84, and thus that the Secretary's decision would stand unless plaintiffs demonstrated the superior accuracy of the adjusted counts both (1) at every level mentioned in Guideline One, and (2) for every reasonable definition of accuracy, Pet. App. 78. Invoking that high standard, the district court deferred to the Secretary's interpretation of the loss function analysis for states and his stated concern about the absence of "direct evidence" for improvement of distributive accuracy

for places of under 100,000 persons.[7] Pet. App. 78. In the district court's view, all of the evidence that had satisfied that court that the adjusted counts were more accurate, Pet.

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[7] The Secretary's ostensible concern about the absence of "direct evidence" for places of under 100,000 population disregarded the Bureau's conclusions that "adjusted counts are generally more accurate" for small areas and the specific results of Bureau analyses showing improved distributive accuracy for "metropolitan places of less than 25,000, 25,000-49,000 and 50,000 or more, and for nonmetropolitan places less than 25,000 and 25,000-49,000 in total," Pet. App. 192.

Another ostensible concern mentioned by the Secretary -- that adjustment would worsen distributive accuracy for 11 of 23 cities with populations over 500,000, Pet. App. 141 -- was not discussed at trial because defendants there never relied upon it. In stating that concern the Secretary's decision repeats both of the mistakes identified with respect to the Secretary's report that adjustment would "worsen" distributive accuracy for more than twenty states -- disregard of both magnitude and probability of error. See above, pp. 20-22. Moreover, the loss function analysis for large cities considers only the cities' relative shares of the population living in such cities -- not the cities' shares of the national population or of their respective states. Large cities do not compete directly (let alone exclusively) with one another for representation or funding. The comparison, even if properly executed, thus involves a factor of no constitutional (or other legal) significance.

App. 59, was insufficient to overcome the powerful presumption created by Guideline One.

The court of appeals disapproved the district court's extreme deference. Following this Court's teaching in Montana, 503 U.S. at 460-464, and on the analysis therein of the line of authority that runs from Wesberry v. Sanders, 376 U.S. 1 (1964), through Karcher v. Daggett, 462 U.S. 725 (1983), the court of appeals observed that the requirement of a "good-faith effort" to achieve equality, where allocation of political representation is at issue, is imposed on federal, as well as state, actors. The court of appeals recognized that constitutional constraints on the apportionment of the House of Representatives mean that "the goal of precise equality in voting power is 'illusory for the Nation as a whole,'" Pet. App. 35 (quoting Montana, 503 U.S. at 463), but concluded that "[t]he impossibility of

achieving precise mathematical equality is no excuse for not making this mandated good-faith effort." Pet. App. 35.

Applying the analytic framework of Karcher, 462 U.S. at 730-731, the court of appeals accepted the district court's finding that the adjusted counts had been shown to be more accurate, Pet. App. 21-22, and proceeded to the question of whether plaintiffs had carried their burden of showing the decision to use less accurate data "was not the product of a good-faith effort to achieve equality," Pet. App. 37. In considerable detail, the court of appeals spelled out the bases for its determination that plaintiffs had carried that burden. Pet. App. 38-39.

Despite the United States' argument, U.S. Pet. 16-17, nothing in Franklin v. Massachusetts is to the contrary. Franklin holds that the standard for reviewing a decision by the Secretary concerning conduct of the census is "consisten[cy] with the constitutional language and the

constitutional goal of equal representation." Franklin, 112 S.Ct. at 2777 (emphasis supplied). The court of appeals explicitly applied the Franklin standard in determining that the Secretary was "required to make a good-faith effort to achieve the Constitution's plain objective of equal representation for equal numbers of people." Pet. App. 35.

c. The court of appeals did not proceed in contravention of Washington v. Davis, 426 U.S. 229 (1976). Citing Washington, the court explained that "[a]lthough for most types of equal protection claims, a plaintiff must show that the government's discrimination was intentional, the Supreme Court has not imposed such a requirement in any of the cases involving apportionment." Pet. App. 35-36 (citations omitted). In such cases, a plaintiff is required to show only "that the governmental entity failed to make a good-faith effort to achieve equal districts as nearly as practicable." Pet. App. 36. The court

of appeals also explained that the right sought to be vindicated in apportionment cases is one of equal protection.[8] Pet. App. 31.

The racial and ethnic character of the differential undercount is relevant because it establishes that the uncorrected census compromises the equality of allocations of political representation based thereon. The court of appeals stated that, "[i]n general, if a law alleged to infringe a certain right directly would require a heightened degree of scrutiny, heightened scrutiny should also be given when the law is alleged to infringe that right discriminatorily." Pet. App. 33. The heightened scrutiny is occasioned by the nature of the right infringed, not by the fact of direct or discriminatory infringement. Thus, the court of appeals did not conclude that heightened scrutiny

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[8] "Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment." Buckley v. Valeo, 424 U.S. 1, 93 (1976).

was warranted simply because the differential character of the undercount peculiarly affects minorities. And surely a decision that impairs equal representation is subject to no lower scrutiny simply because a disproportionate number of those whose voting strength is diluted are members of minority groups.

By recasting the issue as one involving the necessity of proving intent, the United States avoids any discussion of the court of appeals' actual analysis.[9] Notably, though

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[9] The United States, admitting that "it is undisputed that racial minorities were disproportionately undercounted in the 1990 census," then argues that it has not been shown "that a failure to adjust the census totals would in turn have a disparate racial impact with respect to the proper allocation of Representatives among the States, the only constitutionally prescribed use of census data." U.S. Pet. 26. In terms of the apportionment of the House, the adjustment considered by the Secretary in 1991 would have shifted two seats, one from Wisconsin to California, one from Pennsylvania to Arizona. In each instance, a seat would have shifted from a state with a disproportionately white population and lower-than-average undercount to a state with a disproportionately non-white population and greater-than-average undercount. Thus, on average, adjustment would have increased the representational

proclaiming that the decision against adjustment was made without discriminatory animus, the Untied States fails to assert that it was made in a good faith effort to enhance census accuracy. Similarly, the United States fails to explain what legitimate governmental objective reliance upon the unadjusted count is essential to achieve. On remand, the United States will have the opportunity to complete the record in this case by proffering such an explanation.

3. There Is No Conflict among the Courts of Appeals to Warrant Review by This Court

Dissenting in the court of appeals below, the late Judge Timbers stated that "[t]he only two other circuits that have ruled on this issue have agreed with Judge

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strength of areas with higher concentrations of minorities. Obviously, the shifted seats might have been filled by white Representatives. But the Constitution guarantees only that electoral power will be allocated to constituencies on a racially-neutral basis, not that the racial composition of any legislature will reflect national demographic proportions.

McLaughlin," citing City of Detroit v. Franklin, 4 F.3d 1367 (6th Cir. 1993), cert. denied, ___ U.S. ___, 114 S.Ct. 1217 (1994); Tucker v. United States Dep't of Commerce, 958 F.2d 1411 (7th Cir.), cert. denied, ___ U.S. ___, 113 S.Ct. 407 (1992). Judge Timbers thus described the Second Circuit's decision as "creat[ing] a conflict among the circuits." Pet. App. 40.

It is true that neither the Sixth nor the Seventh Circuit ordered that the census be statistically adjusted or held that the Secretary's decision violated the Constitution. But neither did the Second Circuit order an adjustment or conclude that a constitutional violation had occurred. In fact, examination of the relevant decisions reveals that, notwithstanding the dissent in the Second Circuit, the three cases addressed different issues under different analyses; there is no conflict among them, certainly none that warrants review now by this Court.

Tucker was the first of the three cases to be decided.[10] While the census, including the PES, was still being conducted, and thus before Secretary Mosbacher had announced his decision concerning adjustment, the Tucker plaintiffs sought an order that the census be adjusted by unspecified means to correct for undercounting in Illinois.[11] Tucker v. United States Dep't of Commerce, 135 F.R.D. 175, 176 (N.D. Ill. 1991). The district court, concerned

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[10] It was not, of course, the first to be filed. The present case was filed first, in 1988. Tucker was filed in 1990, and City of Detroit in 1991. The earlier decision in Tucker is attributable to the decision of the plaintiffs in that case to seek adjustment of the census without waiting for Secretary Mosbacher's decision.

[11] The Tucker plaintiffs did not, and could not, challenge the apportionment of the House of Representatives, because no plausible correction for undercount in the 1990 census would have added a seat to (or, for that matter, subtracted a seat from) Illinois' delegation. To the extent that the Tucker plaintiffs complained that they had been denied federal representation, see Tucker, 135 F.R.D. at 176, their complaint was that they were underrepresented vis-a-vis residents of other parts of Illinois.

that the outcome of that case might differ from that in other litigation, found the action non-justiciable. Id., 135 F.R.D. at 181-182..

The Seventh Circuit affirmed, on other grounds. That court of appeals rejected the district court's conclusion that the case was non-justiciable as presenting a political question, Tucker v. United States Dep't of Commerce, 958 F.2d at 1415, but affirmed the result, holding that plaintiffs' suit was barred by the intended-plaintiff doctrine, id., 958 F.2d at 1416. In the view of the Seventh Circuit, the Tucker plaintiffs could not show that, even assuming a violation of a constitutional or statutory right, they were "within the class of persons who have been given a right to litigate the violation." Id. (emphasis in original). In arriving at that result, the Seventh Circuit determined only that "Article I, section 2, clause 3 [("Apportionment Clause")] does not authorize lawsuits founded on

disagreement with the Census Bureau's statistical methodology." Id., 958 F.2d at 1418. The Seventh Circuit did not have before it, and so did not consider, a challenge to the Secretary's decision under the Fifth Amendment.[12]

In discussing its application of the intended-plaintiff doctrine, the Seventh Circuit suggested that the same doctrine would bar Massachusetts' suit, which later reached this Court in Franklin v. Massachusetts. Obviously, this Court did not follow the Seventh Circuit's approach, and Wisconsin admits that "this Court's decision in Franklin v. Massachusetts casts doubt on Tucker's specific holding," Wisc. Pet. 16, while the United States does not even

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[12] Indeed, the court of appeals' decision in Tucker mentions the Secretary's decision only once, in a passing reference during a preliminary statement of the background of the case. And while it is arguable that the Seventh Circuit also considered the viability of a challenge under the APA, see id., 958 F.2d at 1416, in context it is clear that the court had in mind a general challenge to the technique of census-taking adopted by the Bureau, not a specific challenge to the Secretary's actual decision.

describe the holding in Tucker and that in this case as being in conflict, U.S. Pet. 26-27. Moreover, in light of Franklin v. Massachusetts, no petitioner here suggests that this Court adopt the Seventh Circuit's application of the intended-plaintiff doctrine. In any event, the specific proposition for which all three petitions cite the court of appeals' decision in Tucker -- that the Apportionment Clause does not per se authorize a suit founded on nothing more than a disagreement with the Bureau's census methodology[13] -- conflicts with nothing in the Second Circuit's decision.

Like Tucker, City of Detroit was a local case, brought by the City of Detroit and its mayor to compel an adjustment or revision of the census for Michigan alone.[14]

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[13] Wisc. Pet. 17, Okla. Pet. 13, U.S. Pet. 27.

[14] As with the Tucker plaintiffs, the City of Detroit plaintiffs alleged that undercounting had deprived them of representation in Congress. City of Detroit, 800 F. Supp. at 540. No national adjustment would have added to (or subtracted from) Michigan's allocation of seats in the House of Representatives; however, the City of Detroit plaintiffs

City of Detroit v. Franklin, 800 F. Supp. 539, 540 (E.D. Mich. 1992). Affirming the trial court's grant of summary judgment, id., 800 F. Supp. at 542-547, the Sixth Circuit held that: (1) with respect to plaintiffs' claims concerning intra-state redistricting, they lacked standing, because the state was at liberty to use other than federal census data for redistricting and there was thus no causal nexus between the challenged (census-taking) conduct and the asserted (representational) injury, City of Detroit, 4 F.3d at 1372-1374; and (2) with respect to plaintiffs' claims concerning federal funding, the Apportionment Clause per se did not create "a right to census accuracy," and an adjustment of Michigan alone, leaving other states untouched, would not increase the overall accuracy of the census, id., 4 F.3d at 1375-1378. While the court of appeals in City of Detroit did refer to the Secretary's decision, it did so only to

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argued that Michigan alone should receive adjusted census figures. City of Detroit, 4 F.3d at 1377.

buttress the point that a special adjustment for Michigan would be "impractical," id. at 1378.

Once again, no petitioner suggests that this Court adopt the Sixth Circuit's standing analysis.[15] Oklahoma and the United States cite the Sixth Circuit's quotation, City of Detroit, 4 F.3d at 1378, of language from Tucker, 958 F.2d at 1418, that a "claim to a census adjustment invokes no judicially administrable standards." That language, however, is part of the Seventh Circuit's analysis of the intended-plaintiff doctrine, as applied to the case before that court, and is inapplicable to the present case. Notably, the United States never argues that either the Sixth or the

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[15] Wisconsin, despite having observed that the continuing vitality of the Seventh Circuit's decision in Tucker is questionable and that the Sixth Circuit's decision in City of Detroit "follow[s] Tucker's reasoning," Wisc. Pet. 17, suggests that the Second Circuit should have considered plaintiffs' ability to use the adjusted data for intra-state redistricting but does not suggest that that consideration (whatever its result) would have affected plaintiffs' standing. Wisc. Pet. 17-18.

Seventh Circuit was correct in concluding that a claim to a census adjustment can never be said to invoke judicially administrable standards – certainly the United States makes no such argument about the claim presented here. Given the nature of the claim before the Sixth Circuit, there is nothing in City of Detroit, any more than in Tucker, that conflicts with the Second Circuit's decision.

Neither Tucker nor City of Detroit involved a claim affecting the national apportionment of the House of Representatives, neither considered a challenge under the Fifth Amendment to the Secretary's decision, and certainly neither addressed the standard of review appropriate upon such a challenge. Although all three courts of appeals dealt generally with matters of census adjustment, they were presented with very different questions: the different substantive results reflect those differences, not a conflict among the circuits.

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari in Nos. 94-1614, 94-1631 and 94-1985 should be denied.

Respectfully submitted.

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